IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL RIVERA,	§	
	§	
Defendant Below,	§	No. 30, 2022
Appellant,	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	
STATE OF DELAWARE,	§	Cr. ID No. 1906006668 (N)
	§	
Appellee.	§	

Submitted: December 9, 2022
Decided: February 13, 2023

Before **SEITZ,** Chief Justice; **VALIHURA** and **TRAYNOR**, Justices.

ORDER

Upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The defendant below-appellant, Michael Rivera, filed this appeal from his convictions for second-degree assault, first-degree unlawful imprisonment, and two counts of strangulation. After careful consideration of the parties' arguments, we affirm the Superior Court's judgment.

(2) A few weeks after Rivera and Laray Ross began dating in April 2019, Ross moved into the New Castle house where Rivera was living. Ross worked at a nursing home. She testified that she gave her paycheck to Rivera. Rivera drove

Ross, who did not have a car or driver's license, to her job and other places she needed to go.

(3) On June 8, 2019, Ross was working the night shift. She exchanged loving text messages with Rivera throughout her shift on a cell phone that Rivera had given her. At some point during her shift, Ross fell and hit her mouth. Ross's mouth was swollen as a result of the fall.

(4) Rivera picked Ross up from work in his van the morning of June 9, 2019. Ross testified that Rivera was angry when he picked her up. Both Ross and Rivera testified that they argued during the drive home. According to Ross, Rivera accused her of smelling like latex, insinuating that she was cheating on him. She also testified that Rivera hit her and demanded that she unbutton her pants so he could make sure her vagina did not smell of latex. According to Rivera, they argued about his belief that was Ross using drugs.

(5) Both Ross and Rivera testified that, when they arrived home, Rivera told her to remove her things from the house. When Ross got out of the van, she walked away from the house. Ross testified that she was scared that if she went inside Rivera would hit her again. Rivera demanded the return of her cell phone, which Ross threw at him. As Rivera followed her, Ross knocked on the doors of nearby houses to get away from him. She asked a man working in his yard for help, but he was unable to do so.

(6) Atilano Alonso-Gonzalez, who was outside preparing to go to work, testified that he saw Ross banging on the door of the house next to his and yelling for help. He heard Rivera telling Ross to calm down. Rivera and Ross passed by Alonso-Gonzalez, with Rivera hugging Ross from behind. Alonso-Gonzalez testified that Ross looked frightened.

(7) Ross testified that Rivera bear-hugged her from behind and threatened to kill her if anyone called the cops and he was locked up. Ross testified that, based on Rivera's promises not to hurt her if she came back to the house and removed her belongings, she followed Rivera back to the house. Camera footage showed Ross following Rivera into the house.

(8) Ross testified that, once inside the house, she left her purse in the screen door to keep it open so she could leave quickly if Rivera hit her again. According to Ross, Rivera removed the purse, locked the door, and again accused Ross of cheating on him. She said that he demanded that she remove her pants so he could smell her vagina to determine whether she had cheated on him. After Ross complied with his demands, she said Rivera insisted that she smelled of latex and began beating and kicking her. Ross testified that she tried to leave the house, but Rivera would not let her.

(9) Ross described how as they struggled, Rivera put both of his hands around her neck and strangled her until she passed out. When she regained

consciousness, Rivera was kicking her and calling her names because she had urinated on herself. Upon Rivera's orders, Ross took a shower. While she was showering, Rivera told her that the cops were at the door and she had better be quiet or he would kill her. There was no record of any police activity at the house at that time.

(10) Ross testified that Rivera hit her in the shower and continued to hit her after she left the shower and went to the living room. In the living room, Ross fell and hit her head on a table. She tried to grab a taser that was on an ottoman, but Rivera threw her on a couch and began to strangle her again. Ross grabbed a lamp and hit Rivera on the head with it. Ross testified that Rivera then stopped strangling her, but continued to beat her.

(11) According to Rivera, he and Ross started arguing shortly after they entered the house. Rivera testified that Ross began hitting him and he pushed her away to defend himself. He also testified that Ross hit him several times with a lamp and stabbed him with a pen. As they struggled, he said they both fell on the floor with Ross hitting her face on an ottoman.

(12) Sometime after Rivera and Ross stopped fighting, they took trash, including the broken lamp, to a dumpster behind a nearby laundromat. According to Rivera, they also went to a Gulf gas station where Ross waited outside in his van while he went inside. Ross did not recall going to the gas station.

(13) Ross testified that when they returned to the house, Rivera insisted that she eat something. He made her a sandwich that she could not eat because her jaw hurt too much for her to open her mouth or chew. They watched a movie and went to bed. Ross testified that Rivera gave her Percocets and Tylenol PM so she could sleep. When Ross would wake up, she would take more because she was in pain and Rivera told her to.

(14) Ross testified that she was supposed to work on June 10th, but Rivera told her to call out so she did. Later on June 10th, Rivera and Ross went to Rite Aid so Rivera could buy cigarettes. As Rivera bought cigarettes at the front of the store, Ross approached the Rite Aid security officer and mouthed "help me" twice.[1] The security officer escorted Ross to a bathroom so she could lock herself in. He testified that Rivera became aggressive and followed them, demanding to know where Ross was going. After Ross locked herself in the bathroom, Rivera banged on the door for a few minutes before leaving the store. The Rite Aid manager spoke with Ross and called 911.

(15) An ambulance took Ross to the hospital. Ross was in the hospital for two or three days. She had an acute fractured jaw, bruising on her head and neck, a black eye, and bruises all over her body. An emergency and forensic nurse who treated Ross at the hospital testified that certain of Ross's injuries were consistent

[1] Appendix to Amended Opening Brief filed on April 19, 2022 at A207.

with strangulation. She also swabbed Ross's neck for DNA. A DNA forensic analyst testified that DNA found on Ross's neck matched Rivera's DNA profile.

(16) On the evening of June 11th, police arrested Rivera. They took him to the hospital because he said his head hurt from Ross hitting him with the lamp. Rivera also reported a wound to his finger from Ross stabbing him with a pen. Rivera told the police to collect surveillance footage from around the neighborhood and the gas station because it would show that he and Ross had been behaving normally.

(17) The jury found Rivera guilty of first-degree unlawful imprisonment as a lesser included offense of first-degree kidnapping, second-degree assault, and two counts of strangulation. The Superior Court sentenced Rivera to twenty years of Level V incarceration, suspended after eleven years for decreasing levels of supervision. This appeal followed. On appeal, Rivera exercised his constitutional right to represent himself.[2]

(18) Rivera's arguments on appeal may be summarized as follows: (i) the Superior Court erred in denying his motion to suppress; (ii) the police were required to obtain a new search warrant for his cell phone and to obtain a search warrant for Ross's cell phone; (iii) the Superior Court erred in dismissing his motion to dismiss

[2] In the Superior Court, Rivera waived his right to counsel and represented himself, with standby counsel, between February 10, 2020 and May 5, 2021 when the Superior Court granted his motion for appointment of counsel.

based on the violation of his right to a speedy trial; (iv) the Superior Court should have conducted a *Getz* analysis before allowing the admission of certain evidence; (v) the Superior Court erred in admitting the DNA evidence; (vi) the Superior Court erred in denying his motion for a missing-evidence jury instruction and failing to *sua sponte* provide a jury instruction on justification; (vii) the evidence was insufficient; and (viii) there were multiple instances of prosecutorial misconduct.

Motion to Suppress Based on Omissions of Information in Warrants

(19) Rivera argues that the Superior Court erred in denying his motion to suppress because the affidavits of probable cause in support of the arrest and search warrants omitted Ross's statements to police that she consented to sex with Rivera on June 9th and that he did not sexually assault or abuse her. The warrants referred to the crime of first-degree rape, which was among the crimes Rivera was arrested for in addition to second-degree assault and strangulation. After issuance of the warrants, the grand jury indicted Rivera for first-degree kidnapping, second-degree assault, strangulation, and terroristic threatening, but not first-degree rape.

(20) Applying a reverse-*Franks* analysis,[3] the Superior Court held that Rivera had not shown that the missing statements were omitted intentionally or

[3] To successfully assert a reverse-*Franks* claim under the United States Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978), "a defendant must show by the preponderance of the evidence that the police knowingly and intentionally, or with reckless disregard for the truth, omitted information from the search warrant affidavit that was material to a finding of probable cause." *Rivera v. State*, 7 A.3d 961, 968 (Del. 2010).

recklessly or were material to the establishment of probable cause.[4] We review the grant or denial of a motion to suppress evidence for abuse of discretion.[5] To the extent the claim of error implicates questions of law, we review *de novo*.[6]

(21) The Superior Court did not err in denying Rivera's motion to suppress. The affidavits of probable cause included Ross's description of Rivera's physical assault and the events leading to that assault, her statement to police that she consented to having sex with him because she feared he would assault her further, and her statement to police that the sex ended when she told Rivera it hurt. The affidavits also included the nurse's statement to police that Ross had been admitted to the hospital with a broken jaw, Ross initially told her that she was not forced or coerced to have sex, and Ross later described the sexual intercourse similarly to how she described it to police.

(22) The omitted statements consisted of Ross telling police that she consented to having sex with Rivera and that he did not sexually assault or abuse her. As the Superior Court recognized, this omitted statement was not material to the establishment of probable cause for the warrants. There was more than sufficient information to establish probable cause that Rivera held Ross against her will and seriously injured her, which led to her having sex with him, while under the influence

[4] *State v. Rivera*, 2021 WL 409421, at *2 (Del. Super. Ct. Feb. 4, 2021).
[5] *Jackson v. State*, 990 A.2d 1281, 1288 (Del. 2009).
[6] *Id.*

of drugs he told her to take, because she feared he would assault her again. Inclusion of the omitted information simply reflected Ross's personal belief that agreeing to have sex with Rivera based on her fear of further assault meant she had consensual sex with him. As the Superior Court also correctly concluded, Rivera failed to show that the omission of this information was intentional, knowing, or reckless.

Failure to Obtain Search Warrants for Cell Phones

(23) For the first time on appeal, Rivera argues that the police were required and failed to: (i) reapply for a search warrant for his cell phone after obtaining a search warrant in July 2019 and not executing that warrant and extracting data from the cell phone until July 2021; and (ii) obtain a search warrant for the cell phone in Ross's possession that was on his cell phone plan. Our review of this claim is limited to plain error because Rivera did not raise this claim in the Superior Court.[7] "[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[8]

(24) The police obtained a search warrant for the contents of Rivera's cell phone, including text messages, between June 9, 2019 and June 10, 2019 in July

[7] Supr. Ct. R. 8; *Fair v. State*, 2015 WL 6941336, at *2 (Del. Nov. 9, 2015).
[8] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

2019, but did not extract the cell phone data until the summer of 2021. Relying on *United States v. Pratt*,[9] Rivera argues that the State was required to obtain another search warrant for his cell phone in the summer of 2021. Rivera's reliance on *Pratt* is misplaced because that case involved the government's delay in seeking a search warrant for a cell phone after seizing the cell phone, not the government's delay in searching a validly seized cell phone.[10]

(25) Unreasonable delay in the execution of a search warrant that results in a lapse of probable cause will invalidate the warrant.[11] Rivera has not shown a lapse of probable cause for the search warrant for his cell phone. The information set forth in the 2019 affidavit of probable cause was more than sufficient to establish probable cause in 2021 that Rivera had committed crimes against Ross in 2019 and that his cell phone could contain information relevant to those crimes.

(26) As to the cell phone Ross used, Rivera contends that Ross could not consent to a search and that police were required to obtain a search warrant because the phone was on his cell phone plan and he gave the phone to Ross. When police search an item upon an individual's consent, the consent must be voluntary and the

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[9] 915 F.3d 266 (4th Cir. 2019).

[10] 915 F.3d at 272-73. *See also U.S. v. Syphers*, 426 F.3d 461, 469 (1st Cir. 2005) (holding that delay in execution of search warrant for computer does not invalidate the warrant absent a lapse in probable cause or render evidence inadmissible absent a showing of prejudice to the defendant from the delay).

[11] *Syphers*, 426 F.3d at 468-69; *U.S. v. Marin-Buitrago*, 734 Fed.2d 889, 894 (2d Cir. 1984).

person giving consent must have the authority to do so.[12] Authority to consent to a search includes "both possession and equal or greater control, vis-à-vis the owner over the area to be searched."[13] Rivera has not identified anything to suggest that Ross's consent was involuntary or that she had less possession or control over the phone than he did. Rivera has not shown plain error.

Right to a Speedy Trial

(27) Rivera contends that the Superior Court erred in denying his motion to dismiss based on the violation of his right to a speedy trial. We review this claim *de novo*.[14] To determine whether a defendant was deprived of his right to a speedy trial, we use the four-factor balancing test set forth in *Barker v. Wingo*.[15] The four factors are the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant.[16] The factors are related, and no one factor is conclusive.[17]

(28) A defendant's right to a speedy trial "attaches as soon as the defendant is accused of a crime through arrest or indictment whichever occurs first."[18] Unless the length of delay is determined to be "presumptively prejudicial," it is not

[12] *Scott v. State*, 672 A.2d 550, 552 (Del. 1996).
[13] *Id.*
[14] *Brodie v. State*, 2009 WL 188855, at *2 (Del. Jan. 26, 2009).
[15] 407 U.S. 514 (1972). *See also Johnson v. State*, 305 A.2d 622, 623 (Del. 1973) (adopting *Barker* test)).
[16] *Barker*, 407 U.S. at 530.
[17] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002).
[18] *Id.*

necessary to consider the additional *Barker* factors.[19] This Court has held that if the delay between arrest or indictment and trial approaches one year, then the Court will generally consider the additional factors.[20]

(29) We will consider the additional factors here because there is more than one year between Rivera's arrest (June 11, 2019) and the start of his trial (August 10, 2021). Trial was originally scheduled for March 3, 2020. After the prosecutor requested a postponement because she had another trial scheduled for the same date that had already been continued once, Rivera's trial was rescheduled for March 24, 2020. On March 13, 2020, the Chief Justice declared a judicial emergency, effective March 16, 2020, because of the COVID-19 pandemic.[21] On March 17, 2020, the Superior Court postponed the trial. Beginning on March 23, 2020, State courthouses were closed to the public.[22]

(30) Trial was rescheduled for June 28, 2021. On June 17, 2021, the prosecutor requested a postponement of the trial until October because he was unavailable for health reasons. Rivera's counsel opposed the request, noting that he was leaving the Office of Defense Services at the beginning of July and would no longer be able to represent Rivera. The Superior Court urged the State to find a

[19] *Barker*, 407 U.S. at 530.
[20] *Cooper v. State,* 2011 WL 6039613, at *7 (Del. Dec. 5, 2011).
[21] Order (Mar. 13, 2020).
[22] Administrative Order No. 3 (Mar. 22, 2020) (closing courthouses to public beginning on March 23, 2020).

prosecutor who could proceed to trial on June 28, 2021, but the State reported that even an experienced prosecutor would not be sufficiently prepared to try a case of this complexity by June 28th. The State also noted that co-defense counsel had been assigned to represent Rivera. The Superior Court ultimately denied the State's request for postponement until October as unreasonable, but granted a postponement until August 9, 2021.

(31) Although the three-week trial delay in March 2020 and the five-week delay trial delay in the summer of 2021 are attributable to the State, most of the trial delay—March 17, 2020 to June 1, 2021—is not attributable to the State. There was a judicial emergency in effect during that time period because of the COVID-19 pandemic.[23] With the exception of a brief period between October 5, 2020 and November 16, 2020, jury trials were suspended between mid-March 2020 and June 1, 2021.[24] The time requirements under the Speedy Trial Guidelines were tolled between March 13, 2020 and July 13, 2021.[25]

[23] Administrative Order No. 22 (June 29, 2021) (extending the judicial emergency until July 13, 2021); Order (Mar. 13, 2020) (declaring judicial emergency effective March 16, 2020).
[24] Administrative Order No. 19 (Apr. 30, 2021) (providing for resumption of jury trials on June 1, 2021); Administrative Order No. 13 (Nov. 16, 2020) (suspending jury trials); Administrative Order No. 10 (Sept. 4, 2020) (providing for resumption of jury trials on October 5, 2020); Administrative Order No. 3 (Mar. 22, 2020) (closing courthouses to public beginning on March 23, 2020).
[25] Administrative Order No. 22 (June 9, 2021) (tolling the time requirements under the Speedy Trial Guidelines until July 13, 2021); Order (Mar. 13, 2020) (tolling the time requirements under the Speedy Trial Guidelines).

(32) As to the third *Barker* factor—the defendant's assertion of his right to a speedy trial—Rivera asserted his right to a speedy trial in the Superior Court. Finally, we consider the prejudice factor in light of the interests that the right to a speedy trial is designed to protect: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired."[26] Rivera was incarcerated throughout the pretrial proceedings, but does not allege that he suffered from undue anxiety or concern. Rivera contends that his defense was impaired because his original defense counsel was unable to represent him at trial and co-defense counsel had only been on his case for three months. Rivera does not specify how his defense was impaired by the change in counsel. Rivera also fails to acknowledge that he represented himself for a significant portion of the pretrial period. In fact, he would have represented himself if the trial had proceeded in March 2020 as original scheduled.

(33) Having considered all of the *Barker* factors, we conclude that they do not weigh in favor of finding a violation of Rivera's right to a speedy trial. More than a year passed between Rivera's arrest and trial date, but most of that delay was not attributable to the State and Rivera has not shown that the delays impaired his defense.

Admissibility of the DNA Evidence

[26] *Weber v. State*, 971 A.2d 135, 162 (Del. 2009).

(34) We review Rivera's claim that the Superior Court erred in denying his motion *in limine* to exclude the DNA evidence for abuse of discretion.[27] As he did below, Rivera contends that the prejudicial value of the DNA evidence on Ross's neck outweighs the probative value of that evidence under Delaware Rule of Evidence ("D.R.E.") 403. He argues that there are many innocent explanations for the presence of his DNA on Ross's neck given their relationship. The State correctly points out that this argument goes to the weight, not the admissibility, of the DNA evidence. The cross-examination of the DNA expert highlighted that DNA testing could not determine how Rivera's DNA got on Ross's neck and that there were many ways that could have happened. The Superior Court did not err in denying the motion *in limine*. As to Rivera's new argument on appeal that the DNA search warrant was defective in the absence of law enforcement possession of a DNA sample linked to a sexual assault, Rivera has not demonstrated plain error.

Admission of Bad Acts Evidence

(35) Rivera did not raise his *Getz* claim below so we review for plain error.[28] Rivera contends that the Superior Court erred in admitting certain evidence—that he penetrated Ross's vagina with his fingers to detect the smell of latex, controlled Ross's finances, and fled instead of turning himself in—without *sua sponte*

[27] *Lampkins v. State*, 465 A.2d 785, 790 (Del. 1983).
[28] Supr. Ct. R. 8; *Wilson v. State*, 950 A.2d 634,641 (Del. 2008).

considering the five factors set forth in *Getz v. State*.[29] He also contends that the Superior Court gave an insufficient limiting instruction to the jury.

(36) Evidence of other crimes or bad acts "is generally inadmissible to prove the commission of the offense charged."[30] Such evidence may be admitted for purposes other than proving propensity, including to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[31] In determining the admissibility of evidence under Rule 404(b), a court considers the following factors set forth in *Getz*:

> (i) the evidence must be "material to an issue or ultimate fact in dispute in the case;"
> (ii) the evidence must be introduced for a proper purpose, including those described in Rule 404(b)(2);
> (iii) the other acts must be proved by plain, clear, and conclusive evidence;
> (iv) the commission of the other acts "must not be too remote in time from the charged offense;"
> (v) the court must "balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403;"[32]

(37) Rivera has not demonstrated plain error. Applying the *Getz* factors, the evidence that Rivera controlled Ross's finances and believed she was cheating on him was probative of his intent and motive in assaulting her. Evidence of Rivera's

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[29] 538 A.2d 726 (1988).
[30] *Deshields v. State*, 706 A.2d 502, 506 (Del. 1998). *See also* D.R.E. 404(b)(1).
[31] D.R.E. 404(b)(2).
[32] *Getz*, 538 A.2d at 734. *See also Deshields*, 76 A.at 506-07 (identifying the factors that the court should consider in applying the Rule 403 balancing test to Rule 404(b) evidence).

behavior after leaving Rite Aid, including that he did not turn himself in to police but was instead arrested at a traffic stop, was relevant to his consciousness of guilt. The eyewitness testimony satisfied the requirement that the evidence be plain, clear, and conclusive.[33] The acts were committed shortly before, during, or after the crimes. Finally, Rivera has not shown that the danger of unfair prejudice substantially outweighs the probative value of this evidence.

(38) As to Rivera's contention that the Superior Court failed to give the jury a sufficient limiting instruction, he is mistaken. The Superior Court gave the limiting instruction agreed upon by his counsel and the prosecutor.[34] This instruction included directions to "not consider these acts for the purpose of concluding the defendant has a certain character or character trait" and to "not use evidence of other acts to conclude that the defendant is a bad person or has a tendency to commit criminal acts and is therefore probably guilty of the crimes charges."[35]

Motion for Relief under Lolly/Deberry

(39) We review the Superior Court's denial of Rivera's motion for relief under *Lolly/Deberry de novo*.[36] Based on the failure of the police to collect the

[33] *Kornbluth v. State*, 580 A.2d 556, 559 (Del. 1990) (recognizing that eyewitness testimony constitutes clear and convincing evidence for purposes of *Getz* analysis).
[34] App. to Amended Opening Br. at A583-84.
[35] Id. at A610-11.
[36] *Hendricks v. State*, 871 A.2d 1118, 1123 (Del. 2005). In *Deberry v. State*, this Court held that the State is obligated to preserve evidence that is material to a defendant's guilt or innocence and that, when the State fails in this duty, the defendant is entitled to an inference that the evidence

correct video footage from the Gulf gas station where he and Ross stopped, Rivera sought dismissal of the charges or a missing evidence instruction under *Lolly/Deberry*. The police collected video footage from the gas station, but later discovered it was for the wrong day. When the police returned to collect footage from the correct day, that footage no longer existed. The Superior Court denied the motion, concluding that the video footage was not particularly important to the kidnapping charges and that there was other sufficient evidence that Ross stayed by herself in the van while Rivera went into the gas station.

(40) To determine if the State breached its obligations under *Lolly/Deberry*, the court considers whether: (i) the requested material is subject to disclosure under Superior Court Criminal Rule 16 or *Brady v. Maryland*;[37] (ii) the State had a duty to preserve the materials; and (iii) the State breached its duty.[38] If the court determines that the State breached its duty, then the court will determine the consequences of the breach by considering: (i) the degree of negligence or bad faith involved; (ii) the importance of the missing evidence and the reliability of secondary or substitute evidence that remains available; and (iii) the sufficiency of the other evidence produced at trial.[39]

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would have been exculpatory. 457 A.2d 744, 750-54 (Del. 1983). In *Lolly v. State*, we extended that obligation to the collection of evidence. 611 A.2d 956, 961-62 (Del. 1992).

[36] 373 U.S. 83 (1963)

[37] 373 U.S. 83 (1963).

[38] *Baynum v. State*, 133 A.3d 963, 968 (Del. 2016).

[39] *Id.*

(41) The State conceded that the video footage was subject to disclosure and should have been preserved. The parties agreed below that there was no bad faith by the police. Rivera contends on appeal that the degree of negligence is so high as to border on bad faith because, if the police had not waited more than six months to review the incorrect video footage they had collected, they would have realized their mistake sooner and been able to collect the correct footage while it was still available. He also argues that the missing video footage was important to his argument that Ross did not act like someone held against her will and his attempt to undermine Ross's credibility, which was the primary issue at trial. He is mistaken.

(42) The importance of the video footage at the gas station is questionable. Rivera's testimony that he left Ross by herself in his van when he went into the gas station was unrebutted because Ross did not recall if they stopped at a gas station. Rivera also had the opportunity to attack Ross's credibility with inconsistencies between her original statements to the police and her trial testimony. In suggesting that Ross's credibility was the primary issue at trial, Rivera ignores the evidence of the injuries she suffered and the eyewitness testimony concerning how she acted in front of Alonso-Gonzalez and at the Rite Aid. There was more than sufficient evidence for the jury to convict Rivera of first-degree unlawful imprisonment,

second-degree assault, and strangulation.[40] The Superior Court did not err in denying Rivera's motion for relief under *Lolly/Deberry*.

Jury Instruction on Self-Defense

(43) Rivera did not request a jury instruction on self-defense under 11 *Del.* § 464, so we review for plain error.[41] Section 464 provides that the use of force upon another person is justifiable when the defendant reasonably believes such force is immediately necessary for the defendant to protect himself against the use of unlawful force by another person. The record does not support a jury instruction that Rivera could have reasonably believed it was immediately necessary to strangle Ross to unconsciousness and to break her jaw for the purpose of protecting himself from her. Rivera has not shown that the trial judge committed plain error when he failed to *sua sponte* instruct the jury on self-defense.

Sufficiency of the Evidence

(44) Because Rivera did not move for a judgment of acquittal in the Superior Court, we review his insufficient-evidence claim for plain error.[42] There is no plain error here as there was sufficient evidence to support Rivera's convictions for first-

[40] *See infra* ¶ 44.
[41] Supr. Ct. R. 8; *Benson v. State*, 105 A.3d 979, 985 (Del. 2014).
[42] Supr. Ct. R. 8; *Swan v. State*, 820 A.2d 342, 358 (Del. 2003).

degree unlawful imprisonment,[43] second-degree assault,[44] and strangulation.[45] This evidence included Ross's testimony regarding how Rivera restrained, beat, and strangled her after accusing her of cheating on him, the testimony of the Rite Aid employees regarding Ross and Rivera's behavior at the Rite Aid, the nurse's testimony regarding Ross's injuries, the presence of Rivera's DNA on Ross's neck, and the photographs of Ross's injuries. Rivera challenges Ross's credibility and inconsistencies between her testimony and previous statements to police, but "the jury is the sole judge of credibility of the witnesses and responsible for resolving conflicts in the testimony."[46]

Prosecutorial Misconduct

(45) Finally, we address Rivera's claims of prosecutorial misconduct. Rivera contends that the prosecutorial misconduct included: (i) misstating or misrepresenting evidence during opening and closing arguments; (ii) presenting false evidence and testimony during direct examination of Ross; (iii) failing to ensure that the jury did not see Ross's wheelchair; and (iv) improper vouching.

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[43] A person is guilty of first-degree unlawful imprisonment when they "knowingly and unlawfully restrain another person exposing that person to the risk of serious physical injury." 11 *Del. C.* § 782.
[44] A person is guilty of second-degree assault when they "recklessly or intentionally cause serious physical injury to another person." 11 *Del. C.* § 612(a)(1).
[45] A person is guilty of strangulation when they knowingly or intentionally impede the breathing of another person by applying pressure to the person's throat or neck. 11 *Del. C.* § 607.
[46] *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

(46) "If defense counsel raised a timely and pertinent objection to prosecutorial misconduct at trial, or if the trial judge intervened and considered the issue sua sponte, we essentially review for harmless error."[47] If, however, defense counsel failed to object and the trial judge did not intervene sua sponte, "we review only for plain error."[48] Regardless of the standard of review, we first conduct a *de novo* review to determine whether misconduct actually occurred.[49] If no misconduct occurred, then the analysis ends under either standard.[50]

(47) If we find misconduct and the claim is subject to plain error review, we "determine whether the error complained of is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[51] If we find misconduct and the claim is subject to harmless error review, we determine whether the prosecutorial misconduct substantially affected the defendant's substantial rights.[52] To make this determination, the Court applies the test set forth in *Hughes v. State* and considers the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the error.[53] If we find no plain error or harmless error warranting reversal, we consider "whether the prosecutor's

[47] *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).
[48] *Id.*
[49] *Id.* at 148-50.
[50] *Id.*
[51] *Saavedra . State*, 225 A.3d 364, 372 (Del. 2020).
[52] *Id.* at 373.
[53] 437 A.2d 559, 571 (Del. 1981).

statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[54]

(48) Because Rivera did not object to the prosecutor's statements during opening and closing arguments and the Superior Court did not intervene *sua sponte*, we apply the plain error standard of review.[55] Having considered the challenged statements and the parties' positions, we conclude that there is no plain error warranting reversal.

(49) Rivera's claim concerning Ross's testimony about a phone call she heard during the incident was not raised below so we review for plain error.[56] During cross-examination, Rivera's counsel asked Ross if she recalled Rivera taking a phone call. Ross said yes and identified Rivera's uncle as the caller. When Rivera's counsel asked if Ross called out or tried to speak to Rivera's uncle, Ross said no. On re-direct, the prosecutor asked Ross if reviewing a transcript of her statement would refresh her recollection.[57] Ross reviewed the transcript of her statement and testified that Rivera told his uncle that he had beaten her during a fight.

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[54] *Hunter v. State*, 815 A.2d 730, 733 (Del.). *See also Saavedra v. State*, 225 A. 3d 364, 383 (Del. 2020) (noting that "[w]e do not look . . . to the repetition of errors within a specific trial, but repetition of the same errors over multiple trials, which reflects a disregard of our prior admonitions and thus impugns the integrity of the judicial process.").

[55] *See supra* ¶ 46.

[56] *Id.*

[57] In asking Ross if reviewing a statement she had previously made would refresh her recollection, the prosecutor did not suggest, as Rivera contends, that there was a transcript of Rivera making the inculpatory statement.

(50) Rivera argues that the prosecutor unnecessarily refreshed Ross's recollection with the transcript of a Family Court hearing in which Ross testified that she heard Rivera tell a friend, not his uncle, about beating her. He further contends that this means the prosecutor intentionally elicited false testimony in violation of his substantial rights. Although we agree that it appears there was not a basis for the prosecutor to refresh Ros's recollection regarding the call, we cannot agree that this was a violation of Ross's substantial rights. This was not a close case, and the identity of the person that Rivera spoke with about beating Ross was not a central issue.

(51) Rivera also claims that the prosecutor failed to ensure that the jury did not see the wheelchair that Ross needed to get to the witness stand. The trial transcript reflects that Rivera's counsel requested, and the prosecutor did not object, to the removal of the wheelchair before the jury entered the courtroom to hear Ross's testimony. The Superior Court judge then identified several places where the wheelchair could be moved to. There is no indication that the wheel chair was not removed. Rivera has not shown any prosecutorial misconduct with respect to Ross's wheelchair.

(52) The improper vouching claims were raised below. When the prosecutor asked the nurse if a strangulation victim could fake abrasions and bruising on their own neck, Rivera's counsel objected and the Superior Court instructed the jury to

disregard the question. Similarly, when the prosecutor asked Rivera whether Alonso-Gonzalez had any reason to lie about him, the Superior Court interjected and instructed the jury to disregard the question. We agree with the State that any error was harmless. This was not a close case. In addition, the Superior Court mitigated any prejudice by immediately instructing the jury to disregard the questions. "Prompt jury instructions are presumed to cure error and adequately direct the jury to disregard improper statements."[58]

(53) Applying *Hunter*, we conclude that there are no repetitive errors casting doubt on the integrity of the judicial process that require reversal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice

[58] *Pena v. State*, 856 A.2d 548, 552 (Del. 2004).